Supreme Court, U.S.
FILED

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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

SANDRA M. CRAWFORD, Individually
and on behalf of her deceased husband,
Van M. Crawford, and as the Administratrix
of the Succession of Decedent, Van M. Crawford,
KEVIN M. CRAWFORD and
KELLY CRAWFORD PRIMEAUX,

Plaintiffs,

VERSUS

MARTIN-MARIETTA, TECHNOLOGIES, INC and
KATHY EATON,

Defendants,

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

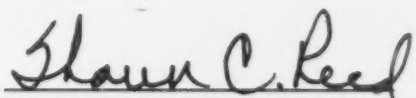
1. Whether the United States Court of Appeals for the Fifth Circuit erred in deciding a negligence issue on Motion for Summary Judgment when the record lacked material evidence as to that issue and said issue was beyond the scope of the narrow issue before the Court at this juncture.

2. Whether Defendants are entitled to summary judgment when there are genuine issues of material facts with regard to plaintiff's claim for negligent infliction of emotional distress and the principal claim for damages occasioned as the result Van Crawford's suicide.

LISTING OF ALL THE PARTIES IN THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

Undersigned counsel for Petitioners provides the following list of parties as required by Supreme Court Rule 21.1(b):

1. Sandra M. Crawford
2. Succession of Van M. Crawford
3. Kevin M. Crawford
4. Kelly Crawford Primeaux
5. Martin-Marietta Technologies, Inc.
6. Kathy A. Eaton
7. Shawn Pedersen Reed
8. Walter P. Reed
9. Howard, Laudumiey, Mann, Reed and Hardy
10. Robert E. Kerrigan, Jr.
11. Darrell K. Cherry
12. Carl A. Butler
13. Deutsch, Kerrigan & Stiles, L.L.P.



SHAWN PEDERSEN-REED
Counsel for Petitioners,
Sandra M. Crawford, et al

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OPINIONS BELOW

In the United States Court of Appeals for the Fifth Circuit, No. 96-30271, Sandra M. Crawford, et al (Plaintiffs-Appellants) v. Martin-Marietta Technologies, Inc. and Kathy Eaton(Defendants-Appellees), Decision dated October 30, 1996 and designated "Not for Publication" and Petition for Rehearing denied on November 26, 1997 both of which are reprinted in the appendix.

In the United States District Court for the Eastern District of Louisiana, No. 95-1596 Division A, Magistrate 3, Sandra M. Crawford, et al v. Martin-Marietta Technologies, Inc. and Kathy Eaton, Decision Dated February 13, 1996 (unpublished) and reprinted in the appendix.

STATEMENT OF JURISDICTION

This Petition for Certiorari arises out of the granting by the United States District Court for the Eastern District of Louisiana of a Motion for Summary Judgment in favor of Defendants, Martin-Marietta Technologies, Inc. and Kathy Eaton. The District Court had jurisdiction of this case under 28 U.S.C. Section 1332. The judgment as to the Motion was entered on February 13, 1996 and was a final appealable

judgment on the merits within the meaning of Rule 54 of the Federal Rules of Civil Procedure.

The decision of the District Court was affirmed but on different grounds by the United States Court of Appeals for the Fifth Circuit on October 30, 1996. On November 13, 1996 a Petition for Rehearing was filed as to the failure of the Court of Appeals to reverse and remand the case to the District Court instead of affirming on different grounds. Said petition for rehearing was denied on November 26, 1996.

The Supreme Court of the United States may properly exercise its power of supervision as the Court of Appeals' ruling herein is in conflict with well settled federal and Louisiana law.

Rule 17.1(a) of the Supreme Court Rules and 28 U.S.C. Section 2101 confer on this Honorable Court's jurisdiction to review the judgment in question by writ of certiorari.

STATEMENT OF THE CASE

This action was filed as a result of the suicide of Van M. Crawford ("Mr. Crawford") on April 14, 1994. Prior to the suicide, Sandra Crawford ("Mrs. Crawford") requested that her husband seek the assistance of the Employee Assistance Program ("EAP") established by his employer, Martin-Marietta

Technologies, Inc. ("Martin-Marietta"). On the day of his suicide, Mr. Crawford, through his supervisor, contacted the EAP office for an appointment as provided for in the company benefits plan.

The employee designated by Martin-Marietta as the counselor for crisis intervention was defendant, Kathy Eaton ("Ms. Eaton") of the EAP office. Ms. Eaton communicated through her secretary with Mr. Crawford's supervisor. Ms. Easton did not directly communicate with Mr. Crawford or his supervisor despite provisions in the EAP policy manual which necessitated direct communication with these parties. She directed her secretary to make an appointment for Mr. Crawford on the following day. No effort was made by the EAP office to ascertain whether the call was an "emergency" or if Mr. Crawford had any thought of suicide. This failure to provide immediate intervention and emotional assessment occurred in spite of the insistence of Mr. Crawford's supervisor that a same day appointment was important.

What appears in hindsight to have been a demonstration of resolve, Mr. Crawford later requested that his supervisor cancel the appointment for the next day. Mr. Crawford then went home, said hello to his wife and went into their bedroom and shot himself in the head without a word of warning to Mrs.

Crawford.

This lawsuit was filed on April 5, 1995 for the wrongful death of Mr. Crawford and the negligent infliction of emotional distress on Mrs. Crawford which is allowed under Louisiana Civil Code Article 2315.6. The Trial Court granted the Defendants' Motion for Summary Judgment, basically holding that both of these causes of action were barred by Louisiana Workers' Compensation Law and that the intentional act exception to that law did not apply. The Fifth Circuit Court of Appeals affirmed the Trial Court decision dismissing the Crawford's causes of action. This dismissal, however, was based on negligence principles, not workers' compensation law.

Notably, the issues with regard to negligence were not addressed nor briefed, and as such, much of the evidence necessary to meet plaintiffs burden of proof with regard to negligence was not in the record. As such, the Court of Appeals' decision on the negligence issue is premature and not supported by the record.

The most striking error results from the dismissal of Ms. Crawford's separate claim for negligent infliction of emotional distress. Because Ms. Crawford was in the zone of danger and came upon the horrendous sight of her dead husband immediately after the fatal shot, she has a separate claim for

damages as the result of the negligent infliction of emotional distress under Louisiana Civil Code Article 2315.6. However, the District Court and the Court of Appeals erroneously failed to apply the applicable law to this issue by dismissing this claim on summary judgment and completely disregarded material facts which relate to Ms. Crawford's individual claim for damages.

ARGUMENT

I. FIFTH CIRCUIT'S DECISION NOT SUPPORTED BY THE RECORD

The Court of Appeal was called upon to review the decision of the District Court in granting defendants' Motion for Summary Judgment based solely on the issue of the Louisiana Workers' Compensation Act exclusive remedy provision. However, the Court of Appeal committed manifest error which deprived plaintiffs of their day in court. They affirmed the lower court's ruling dismissing plaintiffs' claim based on a negligence issue which was not supported by the record due to the summary nature of the proceedings.

A decision by a Court of Appeal may be based on any grounds for which there is a basis in the record, even grounds

not relied upon by the Trial Court. Hensel v. Office of the Chief Administrative Hearing Officer, 38 F.3d 505, 508 (10th Cir. 1994); also see SEC v. Chenery Corp., 63 S.Ct. 454 (1943). In this case, the Fifth Circuit affirmed the Trial Court decision dismissing the action. However, the Fifth Circuit based its decision on negligence principles, NOT the workers' compensation reasoning advanced in the Trial Court. Although the Petitioners concur in the Appellate Court's decision that this is a negligence action, Petitioners respectfully suggest that the record presented to the Fifth Circuit on the negligence issue was not complete and therefore, it was improper for the Court to affirm the granting of the summary judgment.

Specifically, the Court of Appeal concluded that it was not foreseeable that Mr. Crawford would commit suicide in response to Martin-Marietta's failure to question him concerning his emotional state as mandated by the EAP manual and/or schedule an immediate appointment. This rationale represents a gross oversimplification of the facts and circumstances of this claim since the record did not include the preliminary report by Mrs. Crawford's expert psychiatrist or other relevant evidence regarding the conduct of the EAP office personnel and its effect of Van Crawford. The expert report concluded that the EAP office did not make appropriate

attempts to ascertain whether Mr. Crawford's call for help was an emergency or if he had any suicidal ideation.

Further, the record lacked complete depositions of Mrs. Crawford which contained testimony regarding the numerous efforts she had made to get her husband to reach out for help and his final promise to her that he would contact the EAP office for crisis intervention. Nor was Darryl Smith's deposition testimony provided to the Court which highlighted the fact that, as a supervisor, he had no training in ascertaining whether an emergency existed and how to effectively communicate this urgency to the EAP office. Notably, Martin-Marietta's EAP policy manual provided that referrals would come from an employee's supervisor. Even more importantly, Mr. Smith's testimony that he felt it important for Mr. Crawford to be evaluated by the EAP office that day was not appropriately addressed in the record before the Court of Appeal.

Additional evidence which was not part of the record and would be required for a full hearing on the issue of negligence were statements by Anita August wherein she admitted that she had no formal training in crisis intervention and did not make any attempts to ascertain if the call was an emergency or whether Mr. Crawford had suicidal thoughts.

Incredibly, she stated that she was not trained to follow nor did she know the guidelines established by the Martin Marietta EAP manual for crisis intervention counseling.

Also missing from the record is the deposition of Kathy Eaton, the director of the EAP office. She testified that she made no attempts to communicate with Mr. Crawford to ascertain his emotional state in spite of the fact that her secretary, Anita August had informed her that Mr. Smith, Mr. Crawford's supervisor thought that it was important that he be seen that same day.

Finally, the EAP policy manual was not included in the record and this manual specifically outlined the duty of the EAP office in handling crisis intervention telephone calls. Further, the EAP manual would have shed light on the procedures that were ignored by EAP office personnel and which might have highlighted the foreseeability of Mr. Crawford's suicide.

All of the foregoing evidence was reviewed by plaintiffs' expert forensic psychiatrist in formulating her opinion with regard to the breach in the standard of care provided by the EAP office in failing to address Mr. Crawford's needs. As such, it is inconceivable that a trier of fact would not allow briefing on or consider all of the aforementioned evidence in ruling on the foreseeability and duty issues with regard to a

negligence claim when same had not been an issue in the trial court.

The preliminary report provided to plaintiffs by their psychiatric expert was not part of the record because the sole issue pending before the Trial Court and Court of Appeals was whether Louisiana's Workers' Compensation law applied. In light of the nature of the allegations against Martin Marietta EAP office personnel any ruling on the negligence issues in the absence of this expert report, EAP manual and complete deposition testimony constitutes a miscarriage of justice and results in a substantial deprivation of a plaintiffs fundamental rights to due process. Since said evidence is a material part of this tort action, Petitioners' respectfully suggest that this case should not be dismissed with this evidence absent from the record.

II. MATERIAL ISSUES OF FACT EXIST UNDER NEGLIGENCE STANDARDS

The Court of Appeals failed to consider that this matter was on appeal from a summary judgment which dismissed plaintiffs claim due to a single issue, state workers' compensation preemption. As such, no arguments or evidence with regard to the negligence standard was presented, and thus, the judgment of the Court of Appeals is not supported by the

record. The decision which plaintiffs now seek review of this Honorable Court is so far departed from the accepted and usual course of judicial proceedings that it is absolutely necessary for this court to exercise its supervisory power.

A. Court of Appeal Bound to Apply same Summary Judgment Standards as Trial Court.

To affirm a Motion for Summary Judgment the Court of Appeals must engage in the same analysis as the Trial Court. Hanks v. Transcontinental Gas Pipe Line Corp., 953 F.2d 996, 997 (5th Cir. 1992) In the matter at bar, the Court of Appeals substituted its reasoning for that of the trial court which was clearly contrary to the law with regard to Workers' Compensation Pre-emption. In an attempt to preserve the dismissal of the lower court, the Court of Appeal ruled on the negligence issues. As such, the evidence must be viewed in the light most favorable to Mrs. Crawford. In the present situation the only evidence in the record is preliminary and focuses on the Workers' Compensation issues which were being litigated at the time of the filing of Defendants' Motion for Summary Judgment. Thus, insufficient evidence exists in the record for the Court of Appeals to fully perform a duty/risk analysis as required by Louisiana law.

B. Fact Issues Under Louisiana Negligence Law

Under Louisiana's negligence/duty-risk analysis, the plaintiff must prove:

1. the defendant had a duty to conform his conduct to a specific standard;
2. the defendant's conduct failed to conform to the appropriate standard;
3. the defendant's substandard conduct was a cause in fact of the plaintiff's injuries; and
4. there are actual damages.

Three of the four elements are fact questions, while the first element is a legal question. Mathieu v. Imperial Toy Corp., 646 So.2d 318 (La.1994); Berry v. State of Louisiana, 637 So.2d 412 (La.1994). Even though the first element is a legal question, a review of the facts and circumstances of this claim must be conducted in order for the court to determine if Martin-Marietta incurred a legal duty to provide appropriate crisis intervention services and trained personnel in the EAP office when it established the EAP office policies and procedures. To hold otherwise suggests that Martin Marietta could effectively create a trap whereby employees would unjustly rely on crisis intervention from the EAP office to their detriment. Certainly, material issues of fact exist as to whether Martin-Marietta and

Ms. Eaton breached their duty and whether the breach was a cause in fact of Van Crawford's suicide (elements 2 and 3 above).

1. Material Issues of Fact Concerning Breach of Duty

With regard to the second negligence element, numerous material issues of fact exist concerning Ms. Eaton's actions and omissions which failed to conformed with the EAP office policy manual. That is, did she make the appropriate assessment of Mr. Crawford as required by the manual? The witnesses differ on whether or not Ms. Eaton engaged in the proper analysis to determine whether this was an emergency as required by her EAP Manual. This is a material issue in that it is determinative of whether Ms. Eaton and Martin-Marietta breached their duty to Mr. Crawford and his family.[1]

Furthermore, it is logical to conclude that had Martin-Marietta and Ms. Eaton followed their company procedures, the suicide would have been foreseeable. Therefore, it was premature for the Court of Appeals to determine foreseeability when there are material issues of fact as to whether Martin-Marietta and Ms. Eaton breached their duties. The cause of

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[1] The EAP Manual provides that the EAP counselor is duty bound to notify the family in suicidal situations and ask a series of questions designed to alert the telephone counselor to any potential dangers which an employee may pose to himself or others.

action herein is analogous to a medical malpractice claim wherein a health care provider (in this case a mental health care provider) breaches the applicable standard of care and, thus, causes injury to a patient. In this era when large companies are assuming more responsibilities as service providers under the auspices of employee benefit programs, a greater duty is owed to employees who rely on these services and, therefore would certainly be foreseeable that employees in crisis would rely on services such as the Martin Marietta EAP office.

2. Material Issues of Fact Concerning Breach as Cause in Fact of Suicide

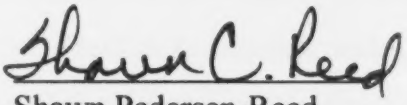
In motion for summary judgment cases, the evidence is to be construed in favor of the non-moving party. As to the third negligence element, Mrs. Crawford's expert psychiatrist concluded in her preliminary report that the actions, or lack thereof, by Martin-Marietta contributed to the situation. Consequently, the psychiatrist's report leads to the conclusion most favorable to Mrs. Crawford, that is, that Martin-Marietta's conduct was a cause in fact of Mr. Crawford's suicide. Further, plaintiffs' expert is prepared to testify that an employee like Van Crawford, who is depressed and withdrawn is more vulnerable to the devastating effects of rejection when they reach out for help and it is denied or brushed off as not that

important. Therefore, the Fifth Circuit's finding of no foreseeability as to the wrongful death and intentional emotional distress claims should be reversed as inconsistent with the required duty-risk analysis and, thus, inappropriate for summary judgment.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals affirming the decision of the District Court granting the Defendants' Motion for Summary Judgment must be reversed to prevent a miscarriage of justice. This case should be remanded to the District Court for an ultimate decision based on a complete record and an appropriate review under the duty-risk analysis and other negligence principles inherent in Louisiana law to avoid deprivation of plaintiffs right to due process under the law and a trial on the merits of their cause of action.

Respectfully submitted,



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Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-30271

SANDRA M. CRAWFORD, individually on behalf of her deceased husband, Van M. Crawford and as the administratrix of the succession of decedent; KEVIN M. CRAWFORD; KELLY CRAWFORD PRIMEAUX,

Plaintiffs-Appellants,

versus

MARTIN-MARIETTA TECHNOLOGIES, INC.; KATHY A. EATON,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana
(95-CV-1596-A)

Before REYNALDO G. GARZA, JOLLY, and Demoss, Circuit Judges.

PER CURIAM:**

Van Crawford, an employee of Martin-Marietta Technologies, Inc., committed suicide in his home on April 14, 1994. On the afternoon of his death, Mr. Crawford had requested an appointment to talk with psychological counselor provided by his work, but agreed to wait until the following day for an appointment.

Contending Martin-Marietta was negligent in failing to schedule the appointment, the appellants sue for the wrongful death of the decedent+ and for negligent infliction of the severe emotional distress caused when Ms. Crawford discovered her husband's body. WE may affirm the district court's decision on any grounds supported by the record. Chevron U.S.A., Inc. v. Traillour Oil Co., 987 F.2d 1138, 1146 (5th Cir. 1993). On the record before us, we hold, as a matter of law, that the suicide was not a foreseeable consequence of Martin-Marietta's failure to schedule an appointment with a counselor, we AFFIRM the district court's opinion.

AFFIRMED.

**Pursuant to Local Rule 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in Local Rule 47.5.4.

Appendix B

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 96-30271

SANDRA M. CRAWFORD, individually on behalf of her deceased husband Van M. Crawford and as the administratrix of the succession of decedent; KEVEN M. CRAWFORD; KELLY CRAWFORD PRIMEAUX

Plaintiffs - Appellants

v.

MARTIN-MARIETTA TECHNOLOGIES, INC.;
KATHY A. EATON

Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING

Before REYNALDO G. GARZA, JOLLY, and DEMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SANDRA M. CRAWFORD, ET AL.	CIVIL ACTION
VERSUS	NO. 95-1596
MARTIN-MARIETTA TECHNOLOGIES, INC. AND KATHY EATON	SECTION "A"(5)

ORDER AND REASONS

Before the Court is the Motion for Summary Judgment filed on behalf of defendants Martin Marietta Technologies, Inc. ("Martin Marietta") and Kathy Eaton ("Eaton") seeking the dismissal of the plaintiffs' suit in tort resting on the exclusive remedy provision of the Louisiana Worker's Compensation Act, La.Rev.Stat. 23:1032. Plaintiff filed formal opposition alleging that material issues of fact exist as to whether the statute applies to the incident sued upon. Defendants filed a formal reply arguing, inter alia, that the statute is quite clearly to the effect that worker's compensation is the exclusive remedy for any employee who is caused injury by the employer or a co-worker that arising from the employment, except where the employee can show that his injury was the result of an "intentional act." As defendants aptly point out, the negligent acts and/or omissions of the defendant co-worker Eaton occurred at work, unquestionably during the course and scope of both Eaton's and the

decedent's employment. That plaintiff's decedent decided to commit suicide at home a few hours after the incident complained of, rather than at work, has no place in the equation.

The matter was noticed for hearing on Wednesday, January 31, 1996, but was deemed submitted on the briefs and documents of record. For the reasons stated hereinbelow, the defendants' Motion for Summary Judgment is GRANTED.

Against the defendants Martin Marietta and Kathy Eaton, for the alleged wrongful death of Martin Marietta's employee, Van Crawford. The plaintiffs in this case are the widow and surviving children of Van Crawford. It is not disputed that Van Crawford committed suicide on April 14, 1994, shortly after departing work that day. The plaintiffs' allegations are simply that Eaton's failure to schedule an immediate appointment for Van Crawford at work on April 1;4, 1994 when called upon at work by him to set up a counseling session constitutes negligence. It cannot be seriously disputed that the alleged negligence of Eaton occurred during the course and scope of her employment with Martin Marietta as a full time employment counselor.***

***Plaintiff's petition reads in pertinent part as follows:

10.

Prior to April 14, 1994, the decedent, VAN M. CRAWFORD, sought help from defendant, KATHY A. EATON, LPC, CEAP Administrator, Employee Assistance Program-Health Quest Program, an employee at MARTIN-MARIETTA TECHNOLOGIES, INC., whose duties included, but were not limited to health counseling of employees and crisis intervention.

The plaintiffs' tort claims against Eaton and Martin Marietta obviously derive from the alleged negligent acts of Eaton vis a vis the decedent Van Crawford, which acts or omissions were admittedly committed while in the course and scope of her employment with Martin Marietta. The plaintiffs' have not brought a claim for worker's compensation benefits.**** Plaintiffs' claims rather sound clearly in

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> 11.
>
> On or about Thursday, April 14, 1994, decedent, VAN M. CRAWFORD's supervisor Darryl Smyth called EATON advising her of Mr. Crawford's mental condition and of his need to see her, defendant, KATHY A. EATON refused to see the decedent VAN M. CRAWFORD advising that she could not see him until the following week.
>
> 12.
>
> Subsequently, on April 14, 1994, decedent VAN M. CRAWFORD committed suicide by fatally shooting himself.
>
> * * *
>
> 14.
>
> Defendant, KATHY A. EATON, negligently failed to take any steps to assist the decedent, VAN M. CRAWFORD, and effectively ignored MR. CRAWFORD's "cry for help."
>
> * * *
>
> 17.
>
> At all times pertinent hereto the acts and/or omissions of defendant, KATHY A. EATON, were within the course and scope of her employment with MARTIN MARIETTA TECHNOLOGIES, INC....
>
> ....

Whether compensation benefits are excluded for acts which are occasioned by an employees own volition is totally immaterial because plaintiffs filed suit in tort and not for benefits under the Louisiana Workers' Compensation Act.

tort.

The following undisputed facts lead to the inescapable conclusion that the case clearly comes within the scope of the Louisiana Workers' Compensation Act which is broadly construed in favor of coverage: (1) plaintiffs seek to impose tort liability on the defendants in this case; (2) the injury producing act without question took place while Van Crawford was at work; and (3) the alleged negligent actions and/or omissions of his co-employee Eaton also took place at work and were within the course and scope of her employment with Martin Marietta. It is not disputed that Eaton only dealt with the decedent Van Crawford and the only contact they had was on the premises of Martin Marietta during work hours.

Plaintiffs do not contend that co-worker Eaton committed any "intentional act."***** The salient undisputed facts regarding the alleged negligent acts/omissions are: (1) on April 14, 1994, plaintiff's decedent committed suicide by fatally shooting himself; (2) on the afternoon of that same day, Van Crawford, a light vehicle operator in the operations department of Martin Marietta went to his supervisor, Darrel Smith, and requested an appointment with the Martin

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*****Under the intentional act exception to the Louisiana Workers' Compensation Act's exclusivity provisions as set forth in La.Rev.Stat. 23:1032(B), plaintiffs must come forward with some evidence that the defendants consciously desired to bring about the harm to the individual or believed that such was substantially certain to follow from the employer's or co-worker's alleged wrongful acts or omissions. Plaintiffs neither contend that EATON's actions/inaction was "intentional" nor have they produced even a scintilla of evidence to that effect.

Marietta's Employee Assistance Program (EAP) Coordinator, Eaton; (3) Smith placed a call to Eaton and was put on hold; (4) Smith was then asked whether or not it was important; (5) at that time Smith was given and Van Crawford agreed to an appointment the next day; (6) neither Smith, Eaton, nor any of Van Crawford's co-workers were apprized that Van Crawford was suicidal or that he was experiencing any physical, mental or emotional problems; (7) up to and including April 14, 1994 Van Crawford functioned at his job and exhibited no problems at work; (8) Van Crawford was always quiet at work, he always exhibited a serious demeanor, and it was no different on April 14, 1994; (9) near the end of his shift Van Crawford stuck his head in the door of Smith's office and told him to cancel the meeting with Eaton the next day because he had gotten what he needed from the benefits office.

Rule 56(c) of the Federal Rules of Civil Procedure provides in pertinent part that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine material issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.Pro. 56(c).

Workers' compensation benefits are generally the exclusive remedy for an employee injured in the course and scope of his

employment. La.Rev.Stat. 23:1061-63.****** Section 1032(B) provides an exception to the exclusivity provisions in the case of an "intentional act." Section 1032(B) provides: "Nothing in this Chapter shall affect the liability of the employer, or any officer, director, stockholder, partner or employee of such employer or principal to a fine or penalty under any other statute or the liability, civil or criminal, resulting from an intentional act."

As previously mentioned, there is not a shred of evidence even tending to indicate that Martin Marietta or Eaton intended Van Crawford's death or that such was certain to follow Eaton's alleged negligence in failing to schedule an appointment immediately with Van Crawford. There is no evidence even hinting that the any one at Martin Marietta, including Van Crawford's supervisor or Eaton, were aware any mental and emotional problems he may have been experiencing on or before April 14, 1994, much less any suicidal tendencies.

In Perniciaro v. Martin Marietta Corporation, 1991 WL 68313

****** As to exclusiveness of rights and remedies with respect to an employer's liability Section 1032(A)(1)(a) provides:

> The rights and remedies herein granted to an employee or his dependent on account of an injury, or compensable sickness or disease for which he is entitled to compensation under this Chapter, shall be exclusive of all other rights and remedies of such employee, his personal representatives, dependents, or relations, against his employer or any principal or any officer, director, stockholder, partner, or employee of such employer or principal for said injury, or compensable sickness or disease.

(E.D. La.) The late Judge Arcenaux had the occasion to consider a similar tort cause filed by the widow and son of Martin Marietta' employee Gregory Perniciaro who committed suicide. Plaintiffs in Perniciaro alleged that Martin Marietta caused the decedents suicide by requiring him to work exceptionally long hours. Plaintiffs attempt to evade the exclusivity of the worker's compensation scheme proved unsuccessful in that suit. Finding no intentional tort Judge Arcenaux granted summary judgment.

In the case at bar plaintiffs have come forth with no evidence and do not even allege an "intentional act." As to the tort claim of negligent infliction of emotional distress, such derives from the alleged actions/inactions of Eaton on April 14, 1994 -- the alleged cause of the Van Crawford's suicide. Such claims are also barred since the exclusive remedy provisions of the Louisiana Workers' Compensation scheme extend to cover the alleged negligence of a co-employee acting within the course and scope of her employment. Eaton had no dealings, whatsoever, with Ms. Crawford and was never called upon to do so. The only contact Eaton had was with Van Crawford on the work premises, at which time she was acting within the course and scope of her employment with Martin Marietta.

Finally, plaintiffs in the case at bar attempt to create a material issue of fact by arguing that perhaps Eaton should have acted in a capacity other than as EAP counselor to Martin Marietta employees. As defendants aptly point out in their reply brief, no facts exist upon which to argue that Eaton was acting or perhaps should

have acted in another capacity.******* The only contact Eaton had was with Van Crawford at work on April 14, 1994 when her assistant scheduled an appointment for Eaton to meet with him the next day — an appointment that Van Crawford had his supervisor cancel right before he left work that day. After he departed the workplace on April 14, 1994, Van Crawford went home and then, shot himself in the head.

The Court can discern no need for any further discussion of the facts, as the material facts are not in dispute. As to the applicable law, it is quite clear. Absent an intentional tort and such does not exist in this case, plaintiffs' tort claims are barred by the exclusivity provisions of the Louisiana Workers' Compensation Act. For all of the above and foregoing reasons,

IT IS ORDERED that the defendants' Motion for Summary Judgment is GRANTED.

*******The "dual capacity" doctrine was statutorily repudiated. Section 1032(A)(1)(b) reads:
"This exclusive remedy is exclusive of all claims, including any claims that might arise against his employer, or any principal or any officer, director, stockholder, partner, or employee of such employer or principal under any dual capacity theory or doctrine."

The Clerk of Court is directed to enter Judgment herein in favor of the defendants dismissing all of plaintiffs' claims against them, plaintiffs to bear all costs of the these proceedings.

New Orleans, Louisiana, this 8th day of February, 1996.

/s/
UNITED STATES DISTRICT JUDGE